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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

LLOYD D. O'QUINN,

Petitioner

VS.

WHITNEY NATIONAL BANK OF NEW ORLEANS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

(1) Whether a state court may, consistent with due process required by the Fourteenth Amendment to the United States Constitution, deny a litigant the right to have his civil case heard before an elected judge where the state constitution provides that "All judges shall be elected."?

(2) Whether a litigant is denied due process of law if he is forced to litigate his suit over his objections before a fact finder who is a tenant and customer of his opposing party?

(3) Whether due process requires that a non-owner, debtor be given notice of foreclosure on properties securing the debt he endorsed?

LIST OF INTERESTED PARTIES

This is a request for a Writ of Certiorari involving two cases which were consolidated for purposes of appeal. The other interested parties who were not listed in the caption are as follows:

Dr. Vincent J. Derbes, represented by James Derbes, Derbes & Derbes, 315 Richards Building, New Orleans, LA, 70112 (504) 522-8706

Dr. Gary R. Brown, represented by Bernard Capella, 7037 Canal Boulevard, Suite 205, New Orleans, LA 70124, (504) 282-1459

Dr. Herbert B. Christianson, represented by Arthur Mann, Tucker & Schonekas, 710 Carondelet Street, New Orleans, LA 70130 (504) 588-9014

28 U.S.C. §2403(b) may be applicable. Therefore the State of Louisiana is an interested party represented by William J. Guste, Jr., Attorney General of the State of Louisiana, 234 Loyola Avenue, New Orleans, LA 70112 (504) 568-5575

The following persons were parties to the lower court proceedings but are no longer interested parties herein:

Dr. Andrew Hegre, represented by John Shambra, 4173 Canal Street, New Orleans, Louisiana 70119, (504) 486-9481

Dr. George Farber & Elks Place Medical Plaza, represented by Richard K. Leefe, 344 Camp Street, Suite 1710, New Orleans, Louisiana 70130, (504) 561-0077

Alma Rita Limburg Burks, represented by

Sidney J. Parlongue, Parlongue & Riegel, 620 First National Bank of Commerce Building, New Orleans, Louisiana 70112, (504) 522-0126

Civil Sheriff of Orleans Parish, not represented Office of the the Civil Sheriff of Orleans Parish, 421 Loyola Avenue, New Orleans, Louisiana 70112, (504) 523-6143

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INTRODUCTION

The petitioner, Lloyd D. O'Quinn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Fourth Circuit, State of Louisiana entered in this proceeding on June 3, 1983.

OPINION BELOW

The Opinion of the Louisiana Fourth Circuit Court of Appeal appears in the Appendix A, and is reported in 436 So.2d 1185 (La. App. 4th Cir. 1983). The order of the Supreme Court of Louisiana denying certiorari, not yet reported, appears in Appendix C.

JURISDICTION

The judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, was entered on June 3, 1983. A timely petition for rehearing was denied on September 2, 1983. The Supreme Court of the State of Louisiana denied Writs of Certiorari or for Review on November 18, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment (Section 1) to the Constitution of the United States provides in pertinent part:

> "...; nor shall any State deprive any person of life, liberty or property without due process of law."

Article 5 §22 of the Louisiana Constitution, 1974, provides in pertinent part:

> "... all judges shall be elected..."

The remaining portions of this section are contained in Appendix H.

La. Rev. Stat. Ann. § 13:1171 (West 1983) provides in relevant part:

> "There shall be three commissioners of the civil district court...The judges of the court sitting en banc shall select the commissioners....All commissioners are subject to removal for any reason for which a judge of the civil district court may be

removed from office...No one is eligible for the office unless he has practiced law in the Parish of Orleans for a period of five years...These officers shall have the power to administer oaths, and to perform all the duties of their office. Whenever any one of the judges of the civil district court has pending before him any case which the judge has reason to believe would require more than three days to try, the judges may assign such case to one of the commissioners...The commissioner shall set the case down for trial, on a day and at an hour selected by him, and shall notify in writing all counsel of record of such fixing... Counsel desiring the presence of witnesses shall have them summoned before the commissioner in the same manner as before the judge, and the commissioner shall proceed to try the cause, having all testimony taken by a court reporter as if the case were tried before the judge...After the testimony has been closed, the commissioner shall hear argument, and when the case is submitted, he shall prepare a written report of his findings...Exceptions to the report of the commissioner may be filed within ten days after notice... If exceptions are filed to the report within ten days, the judge shall set them down for hearing, at the most convenient time, shall hear argument, and decide the exceptions on the record as made up before the commissioner...The commissioner shall use the title of judge ad hoc in the performance of his duties...The commissioner shall rule on all matters of evidence...Each commissioner... shall be eligible for membership in the present retirement plans for judges...A commissioner shall have the same powers as a judge...to punish persons for contempt of court...In those cases which are assigned to the commissioners...any pending exceptions, motions for summary judgment, or other incidental matters shall be heard by the commissioner to whom the case has been

> allotted, and all rulings and judgments on all such incidental matters may be signed by the district court judge immediately upon receipt by him of the commissioner's recommendation..."

The remaining portions of this statute are contained in Appendix I.

La. Code Civ. Proc. art. 2771 (West 1961) provides:

> The creditor may obtain a judgment against the debtor for any deficiency due on the debt after the distribution of the proceeds of the judicial sale only if the property has been sold under the executory proceeding after appraisal in accordance with the provisions of Article 2723.

La. Code Civ. Proc. art. 2723 (West 1961) provides:

> Prior to the sale, the property, seized must be appraised in accordance with law, unless appraisal has been waived in the act evidencing the mortgage or privilege and plaintiff has prayed that the property be sold without appraisal, and the order directing the issuance of the writ of seizure and sale has directed that the property be sold as prayed for.

La. Rev. Stat. Ann. § 13:4106 (West 1968) provides in relevant part:

> If a mortgagee or other creditor takes advantages of a waiver of appraisement of his property, movable, or immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property

> was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property of such deficiency...

La. Rev. Stat. Ann. § 13:4107 (West 1968) provides:

> R.S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts, or other obligations made, or arising on or after August 1, 1934.

La. Rev. Stat. Ann. § 12:4363 (A) (West Supp. 1983) provides:

> Not less than seven days, exclusive of holidays, before the sale of seized property, the sheriff shall serve written notice on the debtor and on the seizing creditor, in the manner provided for the service of citation, directing each to name an appraiser to value the property and to notify the sheriff of his appointment prior to the time stated in the notice, which shall be at least four days, exclusive of holidays, prior to the time of the sale, which appraisal shall be made at least two days, exclusive of holidays, prior to the time of the sale.

STATEMENT OF THE CASE
FACTUAL BACKGROUND

This request for a Writ of Certiorari emanates from two cases which were consolidated for the purposes of appeal. The first suit filed which was captioned by the lower courts as *Whitney National Bank of New Orleans v. Derbes, et al* (hereinafter said suit will be referred to as the

Whitney suit), was a suit on a promissory note against five endorsers. The endorsers raised several defenses to the suit including material alteration of the note, impairment of subrogation rights, failure of consideration, failure of cause, error, fraud and misrepresentation. A determination of the facts in the case would have required the fact finder to determine the credibility and veracity of the witnesses. While the suit was pending in the trial court it was reallotted by the assigned judge to a commissioner pursuant to La. Rev. Stat. Ann. § 13:1171 (West 1983) for all further proceedings. Various pretrial motions and the trial on the merits were heard before the commissioner who made a report and the recommendations for judgment to the judge to whom the case was originally assigned. Petitioner strenuously objected to having his case heard before the commissioner on the basis (1) that La. Rev. Stat. Ann. § 13:1171 (West 1983) was unconstitutional as written or applied as depriving petitioner of his right to have his trial heard before a judge, and (2) that the commissioner should be recused from the case. The commissioner was both a tenant and customer of the Whitney National Bank of New Orleans, having close personal friendships with its officers. The contract for the renewal of his lease was sitting on his desk during the week of the trial.

Following oral arguments on the exceptions to the commissioner's report the assigned trial court judge rendered a decision in favor of the Whitney National Bank of New Orleans for $1,011,064.00 plus interest and attorney fees. Petitoner appealed from the judgment.

While the *Whitney* suit was pending appeal, the Whitney National Bank of New Orleans obtained a writ of fieri facias against petitioner. Petitioner in turn filed suit against the Whitney National Bank of New Orleans for

injunctive relief and for an accounting of funds the bank received through various forclosure suits which the Whitney had filed on properties securing the $1,011,064.00 note. (This second suit, captioned by the lower courts as *O'Quinn v. Whitney National Bank of New Orleans* will hereinafter be referred to as the *O'Quinn* case.) Petitioner had not been made a party to, nor received any notice whatsoever, of the foreclosure suits nor the Whitney's receipt of monies from them.

The trial court in the *O'Quinn* case rendered judgment in favor of Petitioner holding that the judgment in the *Whitney* suit had been totally extinguished. The Whitney National Bank of New Orleans filed an appeal in the *O'Quinn* case and both cases were consolidated for the purposes of appeal.

The Louisiana Fourth Circuit Court of Appeal affirmed the *Whitney* decision and reversed the *O'Quinn* decision.

THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED SO AS TO GIVE THE SUPREME COURT JURISDICTION

The first two due process questions raised by this appeal were first presented in the *Whitney* case prior to trial on the merits before the Commissioner. The constitutionality of the Commissioner system was raised in a "Formal Objection to Transfer to Commissioner and Constitutionality of LA. R.S. 13:1171" stating in relevant parts as follows:

> To the extent that the assignement (sic) of the case to the Commissioner deprives the litigants of

> the benefit of having their civil trial heard before the trier of fact, the statute which permits the transfer to a Commissioner without the assent of both parties is arguably unconstitutional, particularly when the length of the trial is the primary consideration for the transfer...
>
> In the alternative, should this Honorable Court refuse to exercise its authority to hear the case, then O'Quinn attacks the constitutionality of La. R.S. 13:1171 to the extent that the cited statute allows the case to be tried by one who is not a judge within the scope of Art. 5 of the Louisiana State Constitution.

The trial court's judgment on that issue simply stated "...that LA. R.S. 13:1171 is declared constitutional..." The issue was also raised before the Louisiana Fourth Circuit Court of Appeal in an Application for Supervisory Writs stating in relevant part:

> ...Applicant argues that his constitutional rights to a civil trial are being impinged upon because the nature of the present case, wherein the credibility of the witnesses will be the single most important determinative factor, requires the cause be tried before a civil district judge...

The Louisiana Fourth Circuit Court of Appeal denied writs stating:

> On the showing made, particularly considering the importance of the constitutional issue presented and the fact that relator may present the issue on appeal in the event of an adverse judgment, the application is denied.

The issue was then raised before the Supreme Court of Louisiana on an application for supervisory writs which were denied in the case "...reserving to relator all his rights on appeal." The issue was again raised by petitioner before the Fourth Circuit Court of Appeal after the trial on the merits. The Fourth Circuit Court of Appeal held that the statute was constitutional. The issue was again raised in writ applications to the Louisiana Supreme Court which were denied.

The due process issue of the Commissioner's refusal to recuse himself from the *Whitney* suit was orally raised at the beginning of the trial. From the Commissioner's refusal to recuse himself and the district court judge's refusal to grant the motion for recusal, Petitioner sought supervisory writs from both the Fourth Circuit Court of Appeal and the Supreme Court of Louisiana. Both Courts refused writs.

The third due process question was first raised in the initial petition filed in the *O'Quinn* suit. The issue was recognized by the trial court judge who found that the Whitney had "disregarded totally the interests of the endorsers...and intentionally and maliciously imputed funds so as to maintain the full liability of the endorsers...By foreclosing on property used as collateral on the notes...and sold at Sheriff's sale...without notifying endorsers so as to allow endorsers to protect their interests." (Reasons for Judgment in the *O'Quinn* case.) It was reasserted before the Louisiana Fourth Circuit Court of Appeal whose judgment failed to address the issue except in Judge Barry's dissent. The Fourth Circuit denied a rehearing on the issue and the Louisiana Supreme court denied writs of certiorari.

ARGUMENT FOR GRANTING THE WRIT

I.

DUE PROCESS REQUIRES THAT IF A STATE CONSTITUTION PROVIDES THAT ALL JUDGES SHALL BE ELECTED, A LITIGANT NOT BE FORCED TO HAVE HIS SUIT HEARD BEFORE A NON-ELECTED, APPOINTED COMMISSIONER.

The fundamental question raised by this issue goes to the very heart of our judicial and electoral systems. Citizens naturally expect that their trials will be heard personally before a judge who has been properly named to his office according to their state's constitution. Where a state constitution provides that "all judges shall be elected" a state court litigant would naturally assume that his case would be heard before an elected judge except in the event of a vacancy. Where a suit is not heard before such an official, the litigant cannot be expected to feel as though due process has been granted to him and that his voting rights have not been eroded.

In the *Whitney* case the petitioner was forced over his strenuous objections to have his case heard before an appointed commissioner and not before the duly elected judge to whom the case was originally allotted. This was despite the fact that the Louisiana Constitution of 1974 Art. 5§22 provides "....All judges shall be elected..."

The decision in the trial in this matter, which took a week to try, was expected to hinge upon the credibility of the witnesses. There was a significant and substantial conflict between the testimony of Whitney officers and the defendants. A meaningful determination of the facts would

have necessitated that the trier of facts personally hear the evidence, listen to the inflection in the witnesses voices, and view their demeanor.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that New York City welfare recipients were denied procedural due process rights to challenge termination of their benefits where the city's procedures did not permit recipients to appear personally before the official who would finally determine their eligibility. This Court found that the fact that the recipients were not permitted to present evidence to that official orally was constitutionally fatal to the adequacy of the procedures. The Court stated:

> It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his case worker...written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue...written submissions are a wholly unsatisfactory basis for decision.

In *United States v. Raddatz*, 447 U.S. 667 (1980) this Court granted certiorari to determine the constitutionality of a provision of the Federal Magistrates Act which permitted a federal district court to refer to a magistrate a motion to suppress evidence and authorizes the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations. That case can be compared and contrasted to this case in several respects. In both cases the defendants objected to not having their hearings heard personally by the judge on due

process grounds and both parties argued that "[t]he one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 81 (1936).

The statute in question in that case required that the federal district court judge make a de novo determination of those portions of the magistrate's report to which an objection had been made and allowed the judge to receive further evidence or recommit the matter to the magistrate with instructions. The statute in question in this case does not require the state district court judge to make a de novo determination. The statute merely requires that the district court judge render a decision based upon the record as made up before the commissioner without any discretion to recommit the matter or to hear further testimony. It is also important to note that the hearing in *U.S. v. Raddatz* was on a motion to suppress evidence whereas the hearing objected to in this case was the trial on the merits of the case. The Court, in finding that the Magistrate statute was constitutional, concluded "that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." 447 U.S. 667 at 680. This court's opinion indicates that it found the fact that the trial court had to make a de novo review and could require further testimony significant in holding that there had been no denial of due process. This Court further stated:

> To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record. More than 100 years ago, Lord Coleridge stated the view of the Privy Counsel that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:

> "The most careful note must often fail to convey the evidence fully in some of its most important elements...It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence, or precipitancy, his calmness or consideration;...the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it." *Queen v. Bertrand*, 4 Moo.P.C.N.S. 460, 481, 16 Eng. Rep. 391, 399 (1867).

As Mr. Justice Marshall stated in his dissenting opinion in *United States v. Raddatz, supra*, at 696:

> One of the most deeply engraved principals in Anglo-American jurisprudence requires that an official entrusted with finding facts must hear the testimony on which his findings will be based.

Surely in a case such as the *Whitney* suit where each of the defendant's potential liability in the event of an adverse decision is over a million dollars and the risk of error in judicial fact finding based upon review of a written record is so high, and where the governmental interest in administrative convenience is insignificant by comparison, due process requires that litigants not be denied the right to try their suit on the merits personally before the district court judge.

II

DUE PROCESS REQUIRES THAT THE FINDER OF FACT NOT BE THE TENANT AND CUSTOMER OF ONE OF THE PARTIES

Petitioner attempted to have the commissioner to

whom the *Whitney* case was transferred recused prior to the trial on the merits. The basis for the recusation request was that the commissioner was a tenant of the Whitney and had close personal contacts and friendships with Whitney officials. At the hearing on the recusation the commissioner testified that he had been a tenant of the Whitney for the last twenty six years, that he personally knew the Whitney officers who would be testifying at the trial, that he had previously borrowed money from the Whitney, that he maintained various accounts at the Whitney, that in the past he had called on one of the Whitney officers to inform him that he may have temporarily overdrawn his account, and that he had attended law school with the key bank official. Further the commissioner testified that the contract for his lease renewal had just been received prior to the start of the trial.

In *Smith v. Phillips*, 455 U.S. 209 (1982) this Court held that where a juror in a criminal case had applied for a job with the district attorney's office during the week of the trial, that the criminal defendant had been denied procedural due process in that the temptation for abuse was too great to be ignored. Shouldn't the same principal apply where the fact finder has a contract on his desk to sign between himself and one of the litigants during the week of trial?

In *In Re Murchison*, 349 U.S. 133 (1955), at 136, this Court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this

> end no man is permitted to try cases where he has an interest in the outcome. Circumstances and relationships, must be considered...
>
> Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice."

In this case the appearance of justice was lacking. No reasonable man would want to have his case tried before a fact finder who had a twenty six year landlord/tenant relationship with his opposing party. Much less, no man would reasonably volunteer to have a fact finder, who was a close friend of his opposing party's witnesses, determine whose testimony is more credible. Considering the circumstances and relationships of the parties in this case, the motion to recuse the Commissioner should have been granted.

III

DUE PROCESS REQUIRES THAT A NON-OWNER, DEBTOR BE GIVEN PRIOR NOTICE OF FORECLOSURES ON PROPERTIES PLEDGED OR MORTGAGED TO SECURE THE DEBT HE ENDORSED

The Louisiana state courts failed to recognize petitioner's interest in the various properties which were mortgaged or pledged to secure the note endorsed by petitioner. When petitioner signed the $1,011,064.00 note he relied upon assurances of Dr. George Farber, general partner of Elks Place and the officer of the Whitney, that his exposure on the note would be minimal due to the fact that the note was secured with stocks and real estate.

When the Whitney instituted the *Whitney v. Derbes* suit it also initiated several foreclosure suits against the properties securing the $1,011,064.00 note. No notice was even given to Petitioner that the foreclosure suits were pending and Petitioner did not have the opportunity to appoint an appraiser or to take other appropriate measures. Had he been given notice, Petitioner could have helped to create interest in the judicial sales so that more money could have been generated by them to pay off the Elks Place debts. Also, if Petitioner had been given notice of the foreclosure sales he could have timely objected to the Whitney's imputation of monies received from the foreclosures towards payment of Farber's and/or Elks Place's other indebtedness instead of the $1,011,064.00 note. Instead, because Petitioner did not have notice, over a million dollars which should have been imputed towards extinguishment of the $1,011,064.00 note was imputed to more recent, less onerous debts of the bankrupt general partner and limited partnership at the Whitney.

O'Quinn had a "property interest" in the pledged and mortgaged stocks and properties because as a co-debtor with the owner of the property he had a right to expect that in the event of default on the promissory note, that the stocks and properties mortgaged to secure the $1,011,064.00 note would be used to extinguish the debt he endorsed.

The Louisiana Code of Civil Procedure articles and statutes in regard to foreclosures and deficiency judgments are set out on pages four and five. Where a creditor fails to give a debtor notice of a foreclosure sale and/or notice of his right to appoint an appraiser, no personal deficiency judgment can be rendered against the debtor. Those rules were interpreted by the lower courts to

apply to owner-debtors only and not to endorser-non-owner-debtors. This interpretation and distinction ignores the relationships of the parties and the realities of the transaction. It essentially deprives endorsers of any meaningful opportunity to be heard at all in the foreclosure proceedings whether it be on the issue of whether the foreclosure should take place or where the creditor should impute funds received through the foreclosure. It also allows for a creditor and an owner-debtor to conspire against the endorser's interests without his knowledge to impute funds away from the endorsed debt to other indebtedness of the owner-debtor.

The constitutional guarantee of procedural due process has always been understood to embody a presumptive requirement of notice and a meaningful opportunity to be heard before the State acts to deprive a person of his property. This settled principal serves to ensure that a person threatened with loss has an opportunity to present his side of the story to a neutral decision maker "at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67 (1972), at 81-82. "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In this case petitioner had no notice to any of the foreclosure proceedings at which he could have presented his side of the story at a meaningful time and in a meaningful manner. To the extent that the procedural safeguards of due process were not observed in this case grievous errors were made by the Court. Most importantly of those errors was the Court of Appeal's implicit holding that the $1,011,064.00 note was an unsecured loan. The second mortgage on Elks Place Medical Plaza secured the $1,011,064.00 note. The $704,386.67 received by the

Whitney in the Elk Place foreclosure should have been applied to the extinguishment of that note. Instead because the Whitney was able to secretly impute the monies received to other Elks Place indebtedness, petitioner lost the benefit of over $700,000.00. To deprive a person of that amount of money without any prior notice or opportunity to be heard is a grievous miscarriage of justice.

CONCLUSION

The goal of procedural due process is to ensure the accurate determination of decisional facts and informed, unbiased exercises of official discretion. To the extent that procedural safeguards achieve these ends, they reduce the likelihood that a person will forfeit important interests without sufficient justification.

To the extent that a person is denied procedural due process, whether by the deprivation of a trial before an appropriate elected judge, or by trial before an appointed practicing attorney with a relationship with the other party, or by a lack of notice and an opportunity to protect a property right at a meaningful time and in a meaningful manner, the likelihood of an erroneous decision is greatly increased.

Acceptance of this Application for a Writ of Certiorari will allow this Court to establish guidelines for future judicial conduct and prevent a grievous miscarriage of justice.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Louisiana Fourth Circuit Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, William J. Dutel, one of the counsel of record for Petitioner, and a member of the Bar of the Supreme Court of the United States of America, hereby certify, that on the 16th day of February, 1984, I served three copies of the Petition for Writ of Certiorari on each of the several parties hereto as follows:

1. On the Whitney National Bank of New Orleans, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to its counsel of record:
Jerry A. Brown
Monroe & Lemann
1424 Whitney Building
New Orleans, Louisiana 70130

2. On Vincent J. Derbes, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to his counsel of record:
James Derbes
Derbes & Derbes
315 Richards Building
New Orleans, Louisiana 70112

3. On Herbert B. Christianson, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to his counsel of record:
Arthur Mann
Tucker & Schonekas
710 Carondelet Street
New Orleans, Louisiana 70130

4. On Gary R. Brown, by depositing three copies

in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to his counsel of record:
Bernard J. Capella
7037 Canal Boulevard
Suite 205
New Orleans, Louisiana 70124

5. On the State of Louisiana, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to its counsel of record:
William J. Guste, Jr.
Attorney General of the State of Louisiana
234 Loyola Avenue
New Orleans, Louisiana 70112

6. On Dr. Andrew M. Hegre, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to his counsel of record:
John Shambra
4173 Canal Street
New Orleans, Louisiana 70119

7. On Alma Burks, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to her counsel of record:
Sidney J. Parlongue
Parlongue & Riegel
620 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

8. On the Civil Sheriff of Orleans Parish, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to:
Office of the Civil Sheriff of Orleans Parish
421 Loyola Avenue

New Orleans, Louisiana 70112

9. On Dr. George Farber, by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to:
Richard K. Leefe
344 Camp Street
Suite 1710
New Orleans, Louisiana 70130

10. On Elks Place Medical Plaza by depositing three copies in a duly addressed envelope in a United States mailbox with first-class postage prepaid addressed to:
Richard K. Leefe
344 Camp Street
Suite 1710
New Orleans, Louisiana 70130

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

WILLIAM J. DUTEL
Attorney for Lloyd D. O'Quinn
Dutel & Dutel
309 Baronne Street
New Orleans, Louisiana 70112
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APPENDIX "A"

WHITNEY NATIONAL BANK OF NEW ORLEANS

v.

Vincent J. DERBES, Gary R. Brown, Herbert B. Christianson, Andrew M. Hegre and Lloyd D. O'Quinn.

Lloyd D. O'QUINN

v.

WHITNEY NATIONAL BANK OF NEW ORLEANS.

Nos. 12411, 12752.

Court of Appeal of Louisiana, Fourth Circuit.

June 3, 1983.

Rehearing Denied Sept. 2, 1983.

William J. Dutel, Laura J. Todaro, Dutel & Dutel, New Orleans, for Lloyd D. O'Quinn (co-defendant-appellant and plaintiff-appellee).

James G. Derbes, Derbes & Derbes, New Orleans, for Dr. Vincent J. Derbes, M.D. (defendant-appellant).

Bernard J. Capella, New Orleans, for Dr. Gary R. Brown, M.D. (defendant-appellant).

Arthur S. Mann, III, Tucker & Schonekas, New Orleans, for Dr. Herbert B. Christianson, M.D. (defendant-appellant).

Jerry A. Brown, John D. Wogan, Monroe & Lemann, New Orleans, for Whitney Nat. Bank of New Orleans (plaintiff-appellee and defendant-appellant).

Before SCHOTT, BARRY, AUGUSTINE, LOBRANO and WARD, JJ.

SCHOTT, Judge.

This is a consolidated case which began when an in commendam partnership, Elk Place Medical Plaza, borrowed money to finance construction of a building budgeted at $6,011,064. Coldwell Mortgage Trust provided $5,000,000 interim financing and Whitney National Bank of New Orleans loaned the balance represented by a promissory note for $1,011,064, dated July 12, 1973, payable on demand, with 8½% interest per annum and signed by the managing partner, Dr. George Farber. Farber, another general partner, Mrs. Alma Burks, and three limited partners, Drs. Derbes, Brown and Christianson indorsed the note as sureties. In 1975 Dr. Hegre and Lloyd D. O'Quinn purchased a limited partnership equity and also indorsed the note. In December, 1977, Mutual of New York provided $6,500,000 permanent funding which retired the $5,000,000 Coldwell loan and the $1,500,000 balance was applied to various other partnership obligations owed to Whitney. None of the MONY funds were applied to the subject note.

The partnership paid the interest on the note through January 31, 1979, and four months later went

bankrupt. Whitney filed separate lawsuits against Dr. Farber and Mrs. Burks, and then filed suit (said suit hereinafter referred to as *Whitney*) against the other five limited partners as indorsers of the note. Numerous motions and exceptions were filed and the five defendants pleaded a variety of defenses, including material alteration of the note, impairment of subrogation rights due to release of securities, failure of consideration, failure of cause, error, fraud and misrepresentation. The matter was heard before a commissioner who made a report and recommendation to the district judge on July 31, 1980. Following a hearing on exceptions to the commissioner's report, on November 10, 1980, the trial judge rendered judgment in favor of Whitney for $1,011,064, the amount of the note, plus interest at 8½% and attorney fees. All reconventional demands were dismissed as of nonsuit. The five defendants devolutively appealed raising numerous issues and urging defenses. Whitney answered the appeal seeking additional interest.

Subsequently, Whitney obtained a writ of fieri facias against defendant O'Quinn. O'Quinn in turn sued Whitney (said suit hereinafter referred to as *O'Quinn*) for an accounting of funds the bank received after trial and was granted a temporary restraining order halting Whitney's collection efforts. The restraining order was vacated by this court; however, we denied Whitney's motion to stay O'Quinn's suit noting that a debtor has the right to seek injunctive relief "...if the judgment has been extinguished by payment made subsequent to the judgment."[1] Following the

[1] Specifically, this court's order of March 5, 1981, was premised on C.C.P. Art. 2298(2) which entitles the judgment debtor to seek injunctive relief if the judgment has been extinguished by payment made subsequent to the judgment. The order specifically stated:

injunction trial, judgment was rendered in favor of O'Quinn holding that Whitney had received sufficient funds to fully satisfy the promissory note. Whitney filed a suspensive appeal and the case was consolidated in this court with the earlier *Whitney* case.

Initially, we shall treat the significant issues arising out of the *Whitney* suit. *Whitney* was specifically concerned with the validity of the note and the question of liability, if any, of the several indorsers thereon. In this regard, the indorsers had argued that the bank's actions, i.e., failure to inform the parties of the interest rate changes, misrepresentation regarding the amount of collateral available, material alteration, improper imputation of payment, equitable estoppel, renewal, novation, etc. relieved the parties of any liability on the subject note. The facts were heard before a commissioner and a report and recommended judgment were prepared in accordance with LSA-R.S. 13:1171. Following a hearing on exceptions to the findings of the report of the commissioner, the district court judge concluded that there was no merit to the many objections to the commissioner's report except for those concerning the portion of the judgment granting contribution. Accordingly, the district court judge entered his final judgment holding each of the several indorsers liable in solido for the face value of the note at the stated rate of 8½% interest.

The major issues to be decided by this court based upon the *Whitney* record are: (1) are indorsers who signed

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(Footnote 1 continued)

> "The intent of our order was clear. The debtor is not entitled to Art. 2298 relief by further temporary restraining orders, but his rights under Art. 2298 to seek an injunction are preserved. We repeat, however, that lis pendens (our earlier 'res judicata' was a misnomer) precludes relitigating the defenses litigated in the earlier suit now pending on appeal."

at a later date to be considered as accommodation indorsers and thus not primarily liable on the note; (2) did a material alteration take place when the bank made marginal notations of interest rate changes; (3) did Whitney make misrepresentations which would support a plea of contractual error, fraud, or equitable estoppel; and (4) is R.S. 13:1171 which allows for referral of certain cases to a commissioner constitutional.

STATUS OF THE PARTIES

The defendants who signed the note at a later date contend that they are only secondarily liable as indorsers pursuant to R.S. 7:63.[2]

The record reflects that Dr. Hegre and O'Quinn signed the subject note in the latter part of 1975, and that Drs. Christianson, Brown and Derbes signed either on or shortly after the making of the note. The principal argument of those who signed at a later date is that there was no consideration received for their signatures since the subject funds had been transferred at an earlier date. Specific

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[2] In brief and oral arguments the parties have referred to provisions of the Negotiable Instruments Law found in Title 7 of the Revised Statutes. This was repealed by Act 92 of 1974 and replaced by the Commercial Law found in Title 10. Since the new laws became effective on January 1, 1975, they were in effect when Hegre and O'Quinn became indorsers. The result we reach is the same under either law, but the position of Hegre and O'Quinn is weakened considerably if the new law is applied.

R.S. 7:63 provides: Persons deemed indorsers: A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. Replacement R.S. 10:3—402 provides: Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

reference is made to the language on the back of the note which states:

> "In consideration of the making at the request of the undersigned of the loan evidenced by the within note, the undersigned has taken notice of the conditions and promises on the reverse hereof, and binds himself in solido by each and all of them, as there stated."

In this regard, it is clear that the absence of consideration received by either an accommodation indorser, guarantor, or surety has no bearing on the underlying obligations of these parties. See *Guaranty Bank & Trust Company v. Carter,* 394 So.2d 701 (La.App. 3rd Cir.1981) and *Cameron Brown South, Inc. v. East Glen Oaks, Inc.* 341 So.2d 450 (La.App. 1st Cir.1976). By the terms of the subject note the defendant indorsers are obligated in solido with the maker of the note to Whitney Bank. Whether or not the indorsers are considered accommodation parties to the maker has no effect on their status as primary obligors to the bank since any indorser who signs a note containing such language is primarily liable to the payee. *Bonart v. Rabito,* 141 La. 970, 76 So. 166 (La.1917).[3]

MATERIAL ALTERATION

The indorsers allege that the markings placed in the margins amount to material alterations under Negotiable Instrument Law, LSA-R.S. 7:125 and 7:124, and should relieve them of any liability.[4]

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[3] Such is true even if the principal maker is discharged in bankruptcy proceedings. *Meadow Brook National Bank v. Massengill, et al,* 427 F.2d 1055 (5th Cir.1970).

[4] LSA-R.S. 7:124 reads: Alterations, effect of.

Whitney counters that the cases of *Deposit Guaranty National Bank v. Shipp*, 205 So.2d 101 (La.App. 2nd

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(Footnote 4 continued)

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

LSA-R.S. 7:125 reads: Materiality of alteration, any alteration which changes:

(1) The date;

(2) The sum payable, either for principal or interest;

(3) The time or place of payment;

(4) The number or the relations of the parties;

(5) The medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is material alteration.

However, replacement R.S. 10:3—407 provides:
Alteration

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in

(a) the number or relations of the parties; or

(b) an incomplete instrument, by completing it otherwise than as authorized; or

(c) the writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course

Cir.1967), aff'd 252 La. 745, 214 So.2d 129 (La.1968) and *Malinda v. St. Philip*, 138 So.2d 671 (La.App. 4th Cir.1962) stand for the proposition that where an interest rate is changed in the body of the note, the holder may collect the full amount of the note plus interest.

In *Malinda*, the change of interest rate was made with the consent of the maker. In *Shipp*, the Supreme Court noted that the defendant's failure to plead material alteration as an affirmative defense made any ruling on the issue unnecessary under LSA-C.C.P. Art. 1005. Thus, neither *Shipp* nor *Malinda* have specifically ruled upon the question of what liability an indorser on such an altered note should bear.

However, *Malinda* does provide the general principle that where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided as to all parties except any party who himself made, authorized or assented to the alteration and subsequent indorsers. Indeed, this principle has been upheld under the negotiable Instruments Law even though the alterations in question had been made good in good faith. *Simmons v. Green*, 18 La.App. 492, 138 So. 679 (La.App. 2nd Cir.1932).

(Footnote 4 continued)

(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

Therefore, the question to be decided is whether or not these interest rate notations constitute a material alteration which would release the indorsers of their liability.

LSA-R.S. 7:124 and 7:125 are identical with the provisions of Section 124 of the Uniform Negotiable Instruments Act. A study of the decisions of other jurisdictions which have adopted the act reveals that an alteration of an interest rate in a note is a material alteration warranting discharge of all parties not consenting thereto.[5] However, there have also been decisions which have held that marginal notations are not material where they have no bearing on the legal effect of the note. In this regard, the distinction between material and immaterial alterations is to be based upon whether the alteration affects or attempts to affect the terms of the contract or merely represents a memorandum or a collateral agreement which does not in any way change the force and effect of the instrument.[6] We find this rationale applicable to the case now at bar.

The witnesses for the bank had testified that the changes in the interest rates on demand loans were made according to the prevailing market conditions and that a notice of rate change was sent to Elks Place about seven days prior to the effective date of such a change. The bank suggests that this system of rate change binds the indorsers since Farber acted as their agent in his capacity as managing partner of the Elks place partnership. The indorsers argue

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[5] See decisions pertaining to interpretation of 5 Uniform Laws annotated § 124 and § 125.

[6] See: 3A C.J.S. Alteration of Instrument § 34(b), 4 Am.Jur.2d, Alteration of Instruments § 55, and *A. L. Harrington Co. v. Barron*, 15 La.App. 187, 131 So. 503 (La.App. 2nd Cir. 1930) for discussion of marginal memorandum or notations on notes.

that Farber lacked the agency authority to bind them in their individual capacities.

We find that although Farber had authority to bind the Elks Place Partnership, as far as the individual indorsers are concerned, the noted changes of interest rate are only marginal notations which do not change the legal effect of the note since they merely represent a separate agreement of the maker (Elks Place) to pay a higher rate of interest in exchange for the bank's not calling the note due.[7]

FRAUD, ERROR, EQUITABLE ESTOPPEL

The alleged fraud in the *Whitney* suit arises out of the defendant's pleadings which contend that an officer of the Whitney Bank made misrepresentations that the note would be paid off out of funds obtained from permanent financing. The commissioner's report which was adopted by the trial judge stated that the testimony revealed that although the expectation of all parties was that this note was to be discharged when the project was completed and permanent financing obtained, such was never made part of the agreement between the parties. In this regard, the commissioner suggested that the ultimate financial demise of the partnership was a risk which should be borne by the parties who had signed the note since they were all well educated and well advised of the consequences of their actions. Upon review of the record, we find no manifest error

[7] Under present R.S. 10:3—407 a change in interest is not specifically mentioned as a material alteration as was so in R.S. 7:125. Furthermore, R.S. 10:3—407(2)(a) provides that an alteration must be both fraudulent and material to discharge a party.

in regard to the findings of the trial court pertaining to the pleas of fraud, error and equitable estoppel. *Canter v. Koehring Co.*, 283 So.2d 716 (La.1973) and *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978).

CONSTITUTIONALITY OF THE COMMISSIONER'S SYSTEM

The indorsers further argue that the referral of the subject case to a commissioner pursuant to R.S. 13:1171 violated their constitutional right to be heard by an elected judge as provided for by Art. 5 of the Constitution of 1974.

In *Bordelon v. Louisiana Department of Corrections*, 398 So.2d 1103 (La.1981) the court held that R.S. 13:713 establishing the commissioner procedure for the 19th Judicial District Court was not unconstitutional. The court concluded that "certain judicial power may be delegated without any abdication of the judge's fundamental responsibility for deciding cases" and that "delegations of power to conduct evidentiary hearings and to prepare proposed findings of fact and recommendations for disposition based upon the evidence and arguments is not inconsistent with the constitution and laws which vest the judicial power in judges of enumerated courts, as long as the judges retain the responsibility for making the ultimate decisions in the case." (At 1105)

R.S. 13:1171 succinctly sets forth the procedure to be followed when a case is referred to a commissioner, and that procedure has been discussed by this court on prior occasions.[8] The commissioner's authority is limited to

[8] *Boe v. Lake Forest, Inc.*, 384 So.2d 850 (La.App. 4th Cir.1980); *Franklin Printing Co., Inc. v. Collin*, 376 So.2d 1323 (La.App. 4th Cir.1979) and *Lane v. Lane*, 375 So.2d 660 (La.App. 4th Cir.1978).

gathering the facts and making a recommendation to the trial judge. The trial judge is vested with the ultimate authority to render final judgment. In this regard the commissioner's role may be constitutionally viewed as a judicial assistant or special master to whom a case is referred by the judge for 13:1171 does not purport to vest judicial power in commissioners since they cannot render judgment. *Franklin Printing Co., Inc. v. Collin, supra.*

Additionally, it should be noted that R.S. 13:1171 provides a procedure whereby exceptions can be filed to the commissioner's report and recommendation. The statute requires that the trial judge set the exceptions for hearing, hear argument, and decide the exceptions on the record as made up before the commissioner. A review of the record presently before this court, reveals that following the filing of the commissioner's report and the hearing of the exceptions thereto, the trial judge reviewed the record, read all the pleadings and memoranda of counsel, heard the objections to the commissioner's report and recommendations, and rendered his judgment on the subject case. Upon these facts, we find no merit to the appellants' contention that their constitutional rights had been violated.

Having disposed of the significant issues raised by the defendants in the *Whitney* case, we turn to the issues involved in the *O'Quinn* case.

Whitney asserts under local court rules[9] the trial

[9] Rule 8, Section 9, of the Civil District Court for the Parish of Orleans provides:

> "Suits or proceedings that are filed subsequent to suits or proceedings already filed but which grow out of those previously filed suits or proceedings shall not be docketed as separate suits but shall be treated as parts of the previously

judge in *O'Quinn* should have granted its motion to transfer the second lawsuit to the court which heard the *Whitney* case. Considering the nature, allegations and objectives of the two lawsuits, we find that the *Whitney* case should have been treated as part of the previously pending suit. The injunctive relief requested grew out of the prior suit. The subject local court rule allows the district court judge to whom a case has been improperly allotted to transfer the case to the proper division. If the trial judge refuses to do so the party is entitled to seek a supervisory writ from this court directing the clerk of court to properly allot the case in accordance with the rule. However, since the complete record is before us for review no purpose would be served by remanding the case for retrial of the issues.

The bank received substantial monies after the *Whitney* trial ended on June 19, 1980. Whitney argues our March 5, 1981, order limited evidence in *O'Quinn* to sums received after November 10, 1980, when the *Whitney* judgment was signed. Whitney's interpretation would allow the bank to avoid accounting for money it received during the 143 day period after trial and before the judgment was signed. We find that the funds collected by the bank during this interval must be considered in order to determine if the note's imputation clause applies and what balance (if any) is owed on the note.

(Footnote 9 continued)

> pending suits and shall follow the prior allotment or assignment to the respective divisions of the Court. However, all motions for a new trial and all actions for nullity shall be heard by the judge who signed the original judgment. Whenever, by error or by oversight, this rule shall be violated, the judge to whom the matter shall have been allotted shall have the power to order same transferred to the proper division, there to be consolidated with the previously pending suit."

APPLICABILITY OF IMPUTATION CLAUSE

The note's imputation of payments clause states:

> "All parties hereto hereby authorize and empower said Bank, at any time, to appropriate and apply to the payment and extinguishment hereof and/or of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising, and whether then due or not due, up to the amount of $15,000,000.00, said bank being authorized to impute the payments as it sees fit, any and all moneys, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any moneys or other property in transit to or from said Bank for any purpose."

Whitney contends this language gave it authority, without limitation, to apply any payments made on behalf of the partnership or its partners to any obligation of the partnership or any of its limited partners. Though this is a standard imputation clause, its interpretation and the question here on its application is res nova.

Whitney argues in brief: "(T)he $15,000,000.00 limitation is a cap on the pledge obligation of each maker, endorser and guarantor, which many bank attorneys feel is required by the Civil Code articles on pledge." Whitney asserts the fifteen million dollar figure is not a limit on the holder's (bank's) right to impute, but rather on the amount of an individual's collateral that the bank can hold at one time. We disagree. The note states the bank is authorized to apply "... as it sees fit, any and all moneys, stocks, bonds

or other property of any kind whatever ... belonging to any *party* hereto" "... to the payment and extinguishment ... of any of the parties hereto ... *up to* the amount of $15,000,000.00" (our emphasis). Since Whitney prepared the promissory note any ambiguity must be resolved against it. We interpret the fifteen million dollar provision as establishing a limit upon Whitney's right to impute payments at its sole discretion. Once that limit is reached Whitney's discretionary right to impute ends.

Whitney claims O'Quinn was precluded from raising the imputation issue in the *O'Quinn* suit because of collateral estoppel, res judicata and lis pendens. Collateral estoppel is not susceptible of application in a civil law jurisdiction. *Welch v. Crown Zellerbach Corp.*, 359 So.2d 154 (La.1978). Res judicata is not applicable because a final judgment had not been rendered in the first suit. LSA C.C. Arts. 2285, 2286. However, lis pendens has already been held to be applicable to all issues previously litigated.[10] In this regard we find that this aspect of imputation (the fifteen million dollar limit) was not raised, litigated or decided in the first suit and was properly raised in the *O'Quinn* suit.

COMPONENTS OF THE $15,000,000.00 LIMIT

During the *O'Quinn* trial Mike Kingsberry, C.P.A., an expert witness for O'Quinn, determined from subpoenaed bank records that Whitney received payments totaling $19,918,693.64 on Farber-related accounts since the note was executed on July 12, 1973. Whitney complains the sources of payments included by Kingsberry were inappropriate because the records were from seven separate loan accounts, i.e., other Farber borrowing entities, but the

[10] See footnote 1.

bank admits "...(n)othing in the record connects the loans *except* that Dr. George A. Farber was a maker, indorser or guarantor of each loan." (our emphasis). Whitney objected only to the source of the payments and did not produce any evidence to rebut the amounts included by Kingsberry. In any event, we are not inclined to analyze the payments in detail because of the ultimate result we reach in the case. Although we conclude that an aggregate of fifteen million dollars was received by the bank prior to the end of trial in *Whitney* on June 19, 1980, and that Whitney's discretion to freely impute payments had ceased; we find that Whitney was not obliged to impute payments made subsequent to June 19, 1980, to the obligation of defendants on the subject note.

IMPUTATIONS OF PAYMENTS

Once the fifteen million dollar limitation was exceeded Whitney no longer had the right to impute payments as it saw fit. Instead, imputation was thereafter controlled by the following codal articles:

> "Art. 2163. DEBTOR'S RIGHT TO MAKE IMPUTATION. The debtor of several debts has a right to declare, when he makes a payment, what debt he means to discharge."
>
> "Art. 2165. IMPUTATION BY CREDITOR'S RECEIPT. When the debtor of several debts has accepted a receipt, by which the creditor has imputed what he has received to one of the debts specially, the debtor can no longer require the imputation to be made to a different debt, unless there have been fraud or surprise on the part of the creditor."

"Art. 2166. LEGAL ORDERS OR IMPUTATION. When the receipt bears no imputation, the payment must be imputed to the debt, which the debtor had at the time most interest in discharging, or those that are equally due; otherwise to the debt which has fallen due, though less burdensome than those which are not yet payable.

If the debts be of a like nature, the imputation is made to the debt which has been longest due; if all things are equal, it is made proportionally."

The pertinent amounts received after the fifteen million dollar limitation was reached are described as follows:

1. $704,386.67—Received by Whitney on October 29, 1980 from the foreclosure sale of Elk Place Medical Plaza.

2. $4,246.23—Received by Whitney on November 10, 1980 from Harris Mortgage Corporation for application to the debt of Elk Place Medical Plaza.

3. $445,059.09—Received by Whitney from the sale of Farber stock on February 5 and 6, 1981, applied to two loans made by Farber.

The $704,386.67 received by Whitney on October 29, 1980, was the balance of the sales price received by the sheriff on the foreclosure sale of Elk Place Medical Plaza. Whitney held a second mortgage on the building, and applied the funds to those Elk Place partnership loans secured by said mortgage. Common sense dictates that O'Quinn and Hegre cannot contest this imputation. The

sheriff had to deliver the funds remaining after discharge of the first mortgage to the next ranking mortgage holder. We are unaware of any legal principle which prevents that second mortgage holder from applying those proceeds to the secured debt and requires it to apply them to some other debt for the sole benefit of the other debt's surety.

Furthermore, the law supports Whitney's position. Since the debtor made no direction as to application of payment and hence "accepted receipt" of the payment, Whitney's imputation was proper. *C.C. Art. 2165.* When a creditor imputes the payment and informs the debtor of the imputation by a statement of account, the debtor who accepts the statement or receipt without objection or is silent is estopped from questioning the imputation." *Marks v. Deutsch Construction Co.*, 258 So.2d 676 (La.App. 4th Cir.1972), 678, 679. See also, *Romero & Sons Lumber Company v. Babineaux*, 151 So.2d 714 (La.App. 3rd Cir.1963).

The $445,059.09 received by Whitney on February 5 and 6, 1981 from the sale of Farber stock was applied to the credit of various personal loans of Dr. Farber. This was done by the explicit direction of Dr. Farber, and the record is devoid of any evidence that the stock was pledged to secure the note indorsed by O'Quinn. On the contrary, C.C. Art. 2163 specifically provides that a debtor of several debts has the right to declare which debt he means to discharge.

The record is not clear as to the application of the funds received from the Harris Mortgage Corporation. However, the same rules of imputation are applicable. If the debtor, Elk Place Partnership or Farber, directed application of the proceeds to a particular debt, Whitney was

obliged to do so. If Whitney imputed by receipt, without objection from the debtor, the guarantor has no standing to object.

A third party, including an indorser, cannot force the debtor to impute his payment in a particular fashion, nor can he abrogate the creditor's right to impute by receipt when the debtor has failed to declare. See, *Imputation of Payment; A Study of Obligations*, 38 Tul.L.R. 31. See also *Grand Lodge, etc. v. Murphy Const. Co.*, 152 La. 123, 92 So. 757 (1922); *Thompson & Co. v. Sporl*, 160 La. 352, 107 So. 135 (1926).

We have thus concluded that defendants are not entitled to any of the credits they claim on the note sued on in the *Whitney* case and the trial judge in the *O'Quinn* case erred in his conclusion that note was satisfied and extinguished.

Finally, we turn to Whitney's answer to the appeal in which it seeks an increase in the interest of 8½% allowed by the trial court in *Whitney*.

Whitney contends that it was allowed to charge a "floating rate" of interest on the subject note. The allowed 8½% interest was the amount set out in the original note. During the life of the loan Whitney fluctuated its interest rate to as high as 11¼% on April 1, 1979. "Floating" interest rates are not uncommon in financial circles. They are a very integral part of the lending industry. However, in order to bind obligors to such practices they must be advised of same and have consented to it. In the instant case, the note merely stated 8½% interest. No mention was made of a floating rate in the body of the note, nor was there any other agreement indicating consent on behalf of the parties

to a fluctuating rate. While Farber may have consented to changes in the interest rate there is no evidence that any of the indorsers consented or even had knowledge of the purported changes when they occurred. Whitney had no authority unilaterally to change the interest rate of its loan without the consent of the parties thereto.

Accordingly, the judgment in favor of the Whitney National Bank in Suit No. 79-8183 of the Civil District Court against Dr. Vincent J. Derbes, Dr. Gary R. Brown, Dr. Herbert B. Christianson, Dr. Andrew M. Hegre and Lloyd D. O'Quinn is affirmed.

The judgment in favor of Lloyd D. O'Quinn in suit No. 81-1399 of the Civil District Court is reversed and set aside and there is judgment in favor of Whitney National Bank of New Orleans, dismissing Lloyd O'Quinn's suit at his cost, including the cost of the appeal.

Our Docket No. 12411 AFFIRMED.

Our Docket No. 12752 REVERSED AND RENDERED.

WARD, J., concurs.

BARRY, J., dissents.

WARD, Judge, concurring.

Although I agree with the majority's treatment of most issues and with its conclusion, I disagree with the treatment of the issue of imputation of payments. That part of the note which purports to grant Whitney the right to impute payments is so permeated with legalese that it

is ambiguous at best and non sensical at worst, and the majority, in my opinion, misinterprets the imputation clauses of the note.

After eliminating the legalese and after inserting the obvious, I submit the following extract is a more accurate interpretation of the right of Whitney to impute payments.

> "All parties ... agree that the payment hereof may be extended from time to time, one or more times, without notice ...
>
> The property described on the reverse hereof, and any property that may be substituted therefor ... are hereby pledged .. to [Whitney] to secure the payment of this note, and of any note given in extension ... as well as for the payment of any other obligation ... of any of the parties hereto to [Whitney] ... up to the amount of $15,000,000.00 .... All parties ... agree that the property ...pledged may be exchanged [for other pledged property] or surrendered ... without notice to or assent from any party ... [and] ... full irrevocable power and authority are hereby granted and given to [Whitney] ... upon this note note being paid at maturity, to sell, ... the whole of the property of every kind pledged .... [and Whitney] may apply the residue of the proceeds of sale or sales, pro tanto, to the payment of any or all of the obligations or liabilities of the parties hereto or [to] any of them, whether then due or not due, up to the amount of $15,000,000.00 ...
>
> [Additionally] All parties ... authorize ... [Whitney] to appropriate [any of the property described below] and [to] apply to the payment ... [of this note] or of any of the obligations ... of any of the parties hereto, ... [the proceeds from the sale of that property] up to the amount of $15,000,000.00, [and Whitney is] authorized to impute the payments as

> it sees fit, [of] any and all moneys, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto .... All parties ... authorize [Whitney] ... to collect, ... and apply to the payment and extinguishment [of the note] the interest, dividends, or other income accruing and payable on any of the property pledged to secure the payment hereof ....

The note speaks of property, not payments on the note or payments on other indebtedness of the parties, and it should not be interpreted to include payments. The note as I interpret it does not give Whitney the unfettered right to impute payments as it sees fit except from proceeds of the sales of property pledged to secure the note or from money, stocks, and bonds belonging to the parties and then in the hands of Whitney. Hence, imputation of all payments now in dispute should follow the provision of Articles 2163, 2165, and 2166 of the Civil Code.

BARRY, Judge, dissenting:

The note plainly states the bank is authorized to apply "...as it sees fit, any and all moneys, stocks, bonds or other property of any kind whatever ... belonging to *any party* hereto" ... "to the payment and extinguishment ... of *any* of the obligations or liabilities, *direct or contingent*, of *any* of the parties hereto ... *up to* the amount of $15,000,000.00" (my emphasis). The majority correctly interprets this as clearly establishing a $15 million limit upon Whitney's right to impute, but falls into error when applying the provision to several payments the bank received following the *Whitney* trial.

COMPONENTS OF THE 15,000,000.00
(see appendix)

Whitney's records (produced under subpoena) show the bank received payments totalling $19,918,693.64 on Farber-related accounts since the note was executed on July 12, 1973.[1] Each collected amount represents an obligation or liability "direct or contingent" of a "party" (Farber) to the subject note. Based on the bank's records, payments totalling $17,771,215.61[2] were imputed by Whitney to Farber-connected accounts *prior* to the close of trial in *Whitney;* therefore, the bank's discretion to impute payments had ceased and the partnership note should have been reduced accordingly. However, the majority wrongfully concludes that Whitney "was not obliged to impute payments made subsequent to June 19, 1980," then goes on to explain why the various amounts should not be credited to the note. I'm satisfied the payments received subsequent to June 19, 1980 should be credited against the note because of the source of these payments.

IMPUTATION OF PAYMENTS
(see appendix)

After the $15 million limit was reached, codal articles on imputation of payments (LSA-C.C. Arts. 2163 et seq.) are applicable to funds attributable to the partnership

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[1] Dr. Farber apparently had an extraordinary entree or working relationship with Whitney Bank personnel, as shown by the voluminous and inordinate loans in this record.

[2] O'Quinn's expert, Mike Kingsberry, C.P.A., testified that $19,918,693.64 was received on Farber-related accounts prior to the close of the *Whitney* trial. I have amended this figure to exclude payments that were in fact received after June 19, 1980, the close of trial in *Whitney*.

note. Under these provisions payments go to the debt "... which the debtor had at the time the most interest in discharging, of those that are equally due .... If the debts be of a like nature, the imputation is made to the debt which has been longest due ..." LSA-C.C. Art. 2166. Any interest due must be paid either first or concurrently with principal. LSA-C.C. Art. 2164. Certainly the debtor (Farber) had "the most interest in discharging" this debt (secured by a surety)[3] and the record shows it was the "longest due." Hence, once $15 million was exceeded, this note should be the first debt paid out of money collected by the bank on behalf of the partnership account.

The bank argues this issue was litigated in *Whitney* and was precluded by an order from this Court. The $15 million cap was not raised in *Whitney*.[4] These payments were received after the first trial ended and the $15 million had been reached. Therefore, this matter could not have been litigated in *Whitney* and payments received by the bank were not barred from consideration by our March 5, 1981 order.[5]

Whitney also complains that the rules of imputation can be evoked only by the "debtor of several debts"[6] (Farber) and not the surety. That reasoning is illogical. The debtor and creditor have more freedom to act in their

---

[3] *Calatex Oil & Gas Co. v. Smith*, 175 La. 678, 144 So. 243 (1932). Although the parties were bound *in solido* on the note, the endorsers maintained their status as sureties vis a vis the maker.

[4] The issue was raised for the first time in the *Whitney* appeal.

[5] Case # 12367 dated March 5, 1981.

[6] LSA-C.C. Art. 2163

dealings when only their interests are affected rather than when others may be prejudiced by their actions.

After the *Whitney* trial, the note was placed in a separate account by the bank.[7] There were foreclosures on properties and stocks and other collateral were sold, most of which had at one time been pledged by Farber to secure this particular note.[8] Proceeds from the foreclosures and sales of collateral were intentionally credited by the bank to other debts of Farber and Elk Place at Whitney's discretion and Farber's direction. None of the endorsers had notice of the proceedings and did not know how the money was applied by the bank. Whitney and Farber were aware this diversion of funds was to the detriment of the note's endorsers because Elk Place and Farber were in bankruptcy and would never be able to reimburse the sureties (as provided by law) if they were called upon to pay this note.

Under these circumstances, I believe it is unconscionable to allow Whitney and Farber to agree to divert payments to the prejudice of the five endorsers. The sureties had the right to demand imputation as provided by law and their intent should have been manifest to Whitney and Farber after the *Whitney* trial. See *Duffy v. Roman*, 209 So.2d 502 (La.App. 4th Cir.1968), *Grand Lodge, Benevolent Knights of America v. Murphy Construction Co.*, 152 La. 123, 92 So. 757 (1922), *R.P. Fransworth & Co. v. Electrical Supply Co.*, 112 F.2d 150 (5th Cir.), *cert. denied*, 311 U.S. 700, 61 S.Ct. 139, 85 L.Ed. 454 (1940).

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[7] See Exhibit P-20

[8] See the cross-collateral pledge agreement dated September 25, 1978, Farber's July 11, 1973 letter to Mr. Robert Treuting, vice president of Whitney, and Farber's testimony on March 6, 1981.

MANDATORY CREDITS AFTER IMPUTATION

The following sums received by Whitney subsequent to the end of the *Whitney* trial on June 19, 1980, should have been credited:

1. $704,386.67—Received by Whitney on October 19, 1980 from foreclosure sale of Elk Place Medical Plaza. (Exhibit P-20)

2. $4,246.23—Received by Whitney on November 10, 1980 from Harris Mortgage Corporation for application to the debt of Elk Place Medical Plaza. (Exhibit P-20)

3. $445,059.09—Received by Whitney from sale of Farber stock on February 5 and 6, 1981. This amount was applied to two loans made by Farber. (Exhibit P-19)[9]

Farber admitted at trial that the stocks which were "sold"[10] had been pledged to secure the Elk Place debt. (Testimony of March 6, 1981, p. 27). Whitney's only explanation was this amount represented all pledged stock held by the bank registered in the names of Dr. and Mrs. Farber, except Coldwell Mortgage and Fairgrounds stock. The court in *O'Quinn* found that these stocks (i.e. those

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[9] The first loan, for $428,000, was made on November 15, 1978 and due March 14, 1979. The second was a demand note, executed February 9, 1979 in the amount of $61,500. On February 5 and 6, 1981, payments in the amount of $114,826.62 toward interest and $330,232.47 toward principal were made on these two notes, leaving a balance of $159,267.53.

[10] There is no identifying information in the record regarding this block of stocks. Two groups of stock were referred to in Farber's testimony: one group of stocks that had been "sold," and another group not yet sold consisting of Fairgrounds and Coldwell Mortgage stock.

"sold") were pledged to secure the subject note. In light of Farber's testimony and the July 11, 1973 letter (Exhibit P-25) from Farber to Treuting regarding the pledge of stock, I do not find that conclusion erroneous.

Whitney also objects to the inclusion of stock proceeds to extinguish the note based upon Farber's testimony that he and Whitney agreed this amount would apply to his personal loans (see footnote 9, supra.) As stated above, *subsequent to the first trial and the $15 million limit being met,* under the circumstances of this case, the debtor and creditor were not at liberty to direct payments to the prejudice of the endorsers.[11] Farber owed several debts to Whitney and the endorsers herein had the right to imputation in order to protect their positions. These stocks were owned by Farber and pledged to secure this note; unquestionably, the proceeds should have been imputed to this note.[12]

The following assets, when liquidated, should also be imputed:

1. Coldwell Mortgage—36,150 Common Shares
—3,200 Preferred Shares
Fairgrounds—4,196 Common Shares.

---

[11] When questioned why he asked Whitney to use this money to pay his personal debts, he stated:

> "Why not? I owed all of these debts and that's what I originally intended it for and I would rather have my own loan paid off than pay for people that may or may not still be friendly or may or may not have some problems, too. It would be stupid for me to say: Pay off somebody else's first."

[12] Whitney again objects stating this issue was litigated in the first suit. The first suit did not determine the issue of collateral behind the note. Also, these sums were received by Whitney on February 5 and 6, 1981, long after the first trial ended.

Mr. Hart, Whitney's vice president, testified these stocks were held by the bank, belonged to Farber, and were in the process of being sold. Farber testified: "There's been agreed a private sale of these stocks which is waiting on a clarification from Judge Bernard of the bankruptcy court." O'Quinn argues these stocks were pledged to secure the note, citing the July 11, 1973 letter. The stocks were not specifically listed in that letter, but Farber stated he estimated 40% of these stocks were pledged to secure Elk Place (testimony March 6, 1981, p. 29). The evidence is sufficient to require imputation.

2. Funds held by bankruptcy court.

Richard Leefe, attorney representing Elk Place, Harvey Oil Center, and Farber in three bankruptcy proceedings, testified that "approximately two hundred thousand dollars" was available in the Elk Place bankruptcy and Whitney was the largest unsecured creditor. If Whitney receives money from the bankruptcy court on the Elk Place account it should be imputed to the note.

3. $10,000—Certificate of Deposit due March 26, 1981.

At the time of trial (March 5, 1981) the certificate had not matured, but testimony does not confirm that the C.D. was in the name of Elk Place. Whitney's Mr. Hart was the only person to testify regarding this item when referring to securities pledged by Farber to Whitney. Whitney's brief states the C.D. was actually issued in the name of and pledged by Farber. O'Quinn argues it is irrelevant whether issued in Farber's or Elk Place's name as it was clearly available as a credit. If issued in either name, when the money was (or is) received it should be credited to this note.

ITEMS NOT SUBJECT TO IMPUTATION

The *O'Quinn* court erred by including the following amounts for credit to the Elk Place account:

1. $109,000.00—Sale of West Bank Petroleum Club note purchased by Whitney at public sale.

Mr. Hart was the only person to testify regarding this transaction and stated the note was from a tenant of the Harvey Oil Center and pledged by Dr. Farber and Mr. Leefe as security to any of their obligations. This was not refuted by O'Quinn. The amount was credited by Whitney to the Harvey Oil Center account on February 4, 1981. O'Quinn argues it should be a credit because the note was part of the properties cross-collateralized on the cross-pledge of September 24, 1978. However, Mr. Leefe had no association with Elk Place and the evidence is insufficient to allow a credit.

2. $32,240.00—Payments in excess of the note's 8½% interest.

This issue was litigated in the *Whitney* suit. Elk Place, the maker, acquiesced in higher interest rates and that money cannot be recouped by the endorsers.

SUMMARY

The following amounts should be imputed for credit on the partnership note as of the specified dates:

$ 704,386.67—	as of October 28, 1980
4,246.23—	as of November 10, 1980
441,359.95—	as of February 5, 1981

3,699.14—
$1,153,691.99

as of February 6, 1981

In addition, the unliquidated assets (Coldwell and Fairgrounds stock, bankruptcy funds, and C.D.) should be credited whenever received by Whitney.

The Whitney Bank, assisted by Farber, was in the driver's seat throughout this scenario. The endorsers were at the mercy of the bank and its imputation clause (agreeably and legally) up to the bank's self-imposed limitations in the clause. Thereafter, the very purpose of the clause came into play, namely, to protect these endorsers.

O'Quinn should be remanded to complete the accounting of funds received by Whitney in order to determine what balance, if any, is owed to Whitney Bank after considering all permissible credits.

I should also point out that the majority has failed to treat *O'Quinn's* argument relative to the Difficiency (sic) Judgment Act. Serious questions were raised and are unanswered which could effectively alter the majority's disposition of this obligation.

THE FOLLOWING IS THE APPENDIX TO DISSENTING OPINION OF BARRY, J.

WHITNEY-FARBER LOAN ACCOUNTS	PAID TO WHITNEY AS PER KINGSBERRY
Elk Place Medical Plaza Liability Ledger Card	$ 7,179,554.54
George A. Farber, M.D. James W. Burks, M.D.	86,500.00
Farlee Company	4,337,337.24
George A. Farber, M.D. Guy L. Leefe, Jr.	3,730,813.95
Burks Dermatology & Allergy Clinic	120,332.30
Mrs. Alma L. Burks George A. Farber, M.D.	107,000.00
Elk Place Medical Plaza	977,694.64 173,848.70 390,708.79
Farlee Company	504,795.50
George A. Farber, M.D. Guy L. Leefe, Jr.	634,301.19
George A. Farber, M.D.	114,826.62

LESS PAYMENTS RECEIVED AFTER WHITNEY TRIAL (AS PER EXHIBITS)	AMOUNTS TO CALCULATE IMPUTATION
$ 60,000.00	$ 7,101,147.58
18,406.96	
-0-	86,500.00
442,522.33	3,614,602.18
268,098.06	
12,114.67	
109,000.00	3,621,813.95
-0-	120,332.30
-0-	107,000.00
-0-	977,694.64
	173,848.70
	390,708.79
-0-	504,795.50
-0-	634,301.19
103,910.44	-0-
48.65	
10,867.53	

WHITNEY-FARBER LOAN ACCOUNTS	PAID TO WHITNEY AS PER KINGSBERRY
Elk Place Medical Plaza (Foreclosure)	630,225.94
George A. Farber, M.D. and Guy L. Leefe, Jr.	438,470.78
Farlee Co. Foreclosures	492,283.45
	$19,918,693.64

LESS PAYMENTS RECEIVED AFTER WHITNEY TRIAL (AS PER EXHIBITS)	AMOUNTS TO CALCULATE IMPUTATION
555,541.04	-0-
3,821.60	
70,438.67	
424.63	
-0-	438,470.78
134,291.84	-0-
208,968.52	
19,324.17	
8,197.09	
14,921.31	
42,529.17	
12,527.17	
17,331.52	
31,935.80	
2,256.86	
370,781.62	
121,501.83	
$2,147,478.03	$17,771,215.61

APPENDIX "B"

NO. 12411

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

WHITNEY NATIONAL BANK OF NEW ORLEANS

V.

VINCENT J. DERBES, GARY B. BROWN, HERBERT B. CHRISTIANSON, ANDREW M. HEGRE AND LLOYD D. O'QUINN

(CONSOLIDATED WITH)

NO. 12752

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

LLOYD D. O'QUINN

V.

WHITNEY NATIONAL BANK OF NEW ORLEANS

(NO. 12411) APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, NO. 78-8183) HONORABLE MELVIN J. DURAN, JUDGE.

(NO. 12752) APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, NO. 81-1399. HONORABLE JOSEPH V. DIROSA, JR., JUDGE.

* * * *

PER CURIAM

In their application for rehearing the indorsers complain that we did not address their argument that they were discharged because of the Louisiana Deficiency Judgment Act, LSA C.C.P. Arts. 2771 and 2772, R.S. 13:4106, and they ask for a rehearing on this basis.

The Deficiency Judgment Act has no application to the case because the indorsers had no interest in the property foreclosed upon and the property was sold with appraisement after due notice to the owners of the property. *Cameron Brown South, Inc. v. East Glen Oaks,* 341 So.2d 450 (La. App. 1st Cir. 1976), *Ford Motor Credit Company v. Soileau,* 323 So.2d 221 (La. App. 3rd Cir. 1975), *Gumina v. Dupas,* 178 So.2d 291 (La. App. 4th Cir. 1965), writs refused 248 La. 442, 179 So.2d 430 (1965).

REHEARING DENIED

NO. 12411 C W 12752
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

WHITNEY NATIONAL BANK OF NEW ORLEANS

vs.

VINCENT J. DERBES, GARY R. BROWN, HERBERT R. CHRISTIANSON, ANDREW M. HEGRE AND LLOYD D. O'QUINN

(CONSOLIDATED WITH)

LLOYD D. O'QUINN

vs.

WHITNEY NATIONAL BANK OF NEW ORLEANS

MILTON STIRE, CIVIL SHERIFF OF ORLEANS PARISH

* * * *

BARRY, J., WOULD GRANT A REHEARING.

I disagree with the majority's treatment of the imputation clause for the detailed reasons in my dissent.

O'Quinn raises a number of substantial issues, some of which are treated summarily and one of which was ignored:

> "I should also point out that the majority has failed to treat *O'Quinn's* argument relative to the Difficiency (sic) Judgment Act. Serious questions were raised and are unanswered which could effectively alter the majority's disposition of this obligation." (See Dissent, p. 9.)

APPENDIX "C"

THE SUPREME COURT OF
THE STATE OF LOUISIANA

Number 83-C-2067

WHITNEY NATIONAL BANK OF NEW ORLEANS

VS.

VINCENT J. DERBES, GARY R. BROWN, HERBERT B. CHRISTIANSON, ANDREW M. HEGRE AND LLOYD D. O'QUINN

CONSOLIDATED WITH

LLOYD D. O'QUINN

VS.

WHITNEY NATIONAL BANK OF NEW ORLEANS

In Re: VINCENT J. DERBES, GARY R. BROWN, HERBERT B. CHRISTIANSON, AND LLOYD D. O'QUINN, applying for Certiorari or writ of review, to the court of Appeal Fourth Circuit, Numbers 12411 & 12752, from the Civil District Court, Parish of Orleans, Numbers 78-8183 & 81-1399.

November 18, 1983

Denied.

PFC

JAD

WFM

JLD

FAB

HTL

WATSON, J., RECUSED.

Supreme Court of Louisiana
November 18, 1983

Clerk of Court
For the Court

APPENDIX "D"

NO. 11630

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

JUNE 2, 1980

Clerk

WHITNEY NATIONAL BANK OF NEW ORLEANS

VERSUS

VINCENT J. DERBES, GARY R. BROWN, HERBERT B. CHRISTIANSON, ANDREW M. HEGRE AND LLOYD D. O'QUINN

In Re LLOYD D. O'QUINN

Applying for SUPERVISORY WRITS
DIRECTED TO:

HONORABLE MELVIN DURAN, JUDGE, CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "I", No. 79-8183

Writs refused.

On the showing made, particularly considering the importance of the constitutional issue presented and the fact that relator may present the issue on appeal in the event of an adverse judgment, the application is denied.

New Orleans, Louisiana, June 3, 1980

(SIGNED)
JUDGE

(SIGNED)
JUDGE

(SIGNED)
JUDGE

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APPENDIX "E"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

No. 67,726

WHITNEY NATIONAL BANK OF NEW ORLEANS

VS

VINCENT J. DERBES, GARY R. BROWN,
HERBERT B. CHRISTIANSON, ANDREW M.
HEGRE AND LLOYD D. O'QUINN

In Re: Lloyd D. O'Quinn, applying for writs of certiorari, prohibition, mandamus and stay order, Parish of Orleans, No. 79-8183.

June 6, 1980

Writs denied, reserving to relator all his rights on appeal.

JAD

PFC

WFM

JLD

FAB

HTL

Watson, J., recused.

Supreme Court of Louisiana
June 6, 1980

_____

Dy. Clerk of Court
For the Court

APPENDIX "F"

NO. 11651
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

WHITNEY NATIONAL BANK OF NEW ORLEANS

versus

VINCENT J. DERBES et al

* * *

IN RE LLOYD D. O'QUINN
APPLYING FOR WRITS OF CERTIORARI,
PROHIBITION AND MANDAMUS AND STAY ORDER
DIRECTED TO HONORABLE MELVIN DURAN,
JUDGE CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS DIVISION "I", NO. 79-8183

ORDER

Having now read the transcript of testimony, we conclude that the application's allegations are not well founded and that the ruling complained of is correct.

Writs are therefore refused and our stay order is recalled.

New Orleans, Louisiana, June 10, 1980.

(Signed)
JUDGE

(Signed)
JUDGE

(Signed)
JUDGE

APPENDIX "G"

THE SUPREME COURT OF
THE STATE OF LOUISIANA

NO. 67,801

WHITNEY NATIONAL BANK OF NEW ORLEANS

V.

VINCENT J. DERBES, GARY R. BROWN,
HERBERT B. CHRISTIANSON, ANDREW M.
HEGRE AND LLOYD D. O'QUINN

In Re: Lloyd D. O'Quinn, applying for Writs of Certiorari, Prohibition, Mandamus & Stay Order. Parish of Orleans Civil District Court, Division I. No. 79-8183.

June 11, 1980

Denied.

PFC

JAD

WFM

JLD

FAB

HTL

Watson, J., recused.

Supreme Court of Louisiana
June 11, 1980

Clerk of Court
For the Court

APPENDIX "H"

Art. 5 §22 of the Louisiana Constitution, 1974 provides:

> (A) Election. Except as otherwise provided in this Section, all judges shall be elected. Election shall be at the regular congressional election.
>
> (B) Vacancy. A newly-created judgeship or a vacancy in the office of a judge shall be filled by special election called by the governor and held within six months after the day on which the vacancy occurs or the judgeship is established, except when the vacancy occurs in the last six months of an existing term. Until the vacancy is filled, the supreme court shall appoint a person meeting the qualifications for the office, other than domicile, to serve at its pleasure. The appointee shall be ineligible as a candidate at the election to fill the vacancy or the newly-created judicial office. No person serving as an appointed judge, other than a retired judge, shall be eligible for retirement benefits provided for the elected judiciary.
>
> (C) End of Term. A judge serving on the effective date of this constitution shall serve through December thirty-first of the last year of his term, or, if the last year of his term is not in the year of a regular congressional election, then through December thirty-first of the following year. The election for the next term shall be held in the year in which the term expires, as provided above.

APPENDIX "I"

LSA-R.S. 13:1171 provides as follows:

A. There shall be three commissioners of the civil district court who shall be designated as Commissioner A, Commissioner B, and Commissioner C. The judges of the court sitting en banc shall select the commissioners for terms of six years. Should there be vacancy created by the removal, resignation or death of any commissioner, the judges of the court sitting en banc shall fill the vacancy by appointment for the unexpired term. At the termination of the initial term and/or any subsequent terms of a commissioner, the judges of the court sitting en banc shall appoint successors to the office for like terms. All commissioners are subject to removal for any reason for which a judge of the civil district court may be removed from office. Such removal shall be by order of the judges of the court sitting en banc, after notice and hearing. No one is eligible for the office unless he has practiced law in the parish of Orleans for a period of five years.

B. These officers shall have the power to administer oaths, and to perform all the duties of their office.

C. Whenever any one of the judges of the civil district court has pending before him any case which the judge has reason to believe would require more than three days to try, the judge may assign such case to one of the commissioners. Such case shall be allotted in accordance with the method employed by the Civil District Court for the Parish of Orleans.

D. The commissioner shall set the case down for trial, on a day and at an hour selected by him, and shall notify in writing all counsel of record of such fixing. This notice shall be served by the civil sheriff.

E. Counsel desiring the presence of witnesses shall have them summoned before the commissioner in the same manner as before the judge, and the commissioner shall proceed to try the cause, having all testimony taken by a court reporter as if the case were tried before the judge.

F. After the testimony has been closed, the commissioner shall hear argument, and when the case is submitted, he shall prepare a written report of his findings, which shall contain the following elements:

(a) A statement of the pleadings;
(b) A statement of the facts as found by him;
(c) An opinion based on the pleadings and the facts;
(d) Such judgment as he thinks should be rendered, together with a recommendation to the judge that it be made the judgment of the court.

G. The report shall be filed by the commissioner with the clerk of the civil district court, who shall at once give written notice to counsel of record that such report has been filed. This notice shall be served by the civil sheriff.

H. Exceptions to the report of the commissioner may be filed within ten days after notice, as required by R.S. 13:1171G.

I. If exceptions are filed to the report within ten days, the judge shall set them down for hearing,

at the most convenient time, shall hear argument, and decide the exceptions on the record as made up before the commissioner.

J. Each commissioner shall receive a salary of thirty seven thousand one hundred forty four dollar per annum, payable monthly on his warrant by the state.

K. The commissioner shall use the title of judge ad hoc in the performance of his duties under the provisions of this Section.

L. The commissioner shall rule on all matters of evidence in the same manner and in the same form as are prescribed by the constitution and laws of this state relative to judges of the Civil District Court for the Parish of Orleans.

M. Repealed by Acts 1976, No. 486, §2.

N. The commissioners shall be prohibited from practicing law before the Civil District Court for the Parish of Orleans.

O. Each commissioner and judge ad hoc shall be eligible for membership in the present retirement plan for judges of courts of record but persons must transfer to any future funded retirement plan or system for judges of courts of record.

P. Any judge who immediately prior to taking office served as a commissioner and judge ad hoc shall be entitled to add his years of service as a commissioner and judge ad hoc to his years of service as a judge for the purpose of accumulating years of service for retirement eligibility under the present or any future retirement plan or system for judges of courts of record.

Q. A commissioner shall have the same powers as a judge of the Civil District Court for the Parish of Orleans, as set forth in Code of Civil Procedure Articles 221 through 227, to punish persons for contempt of court.

R. In those cases which are assigned to the commissioners under Subsection C of this Section, any pending exceptions, motions for summary judgment, or other incidental matters shall be heard by the commissioner to whom the case has been allotted, and all rulings and judgments on all such incidental matters may be signed by the district judge immediately upon receipt by him of the commissioner's recommendation, without the necessity for compliance with the provisions of Subsections F, G, H and I of this Section.

S. Commissioners of the Civil District Court of the Parish of Orleans shall be reimbursed actual expenses of the salaries of stenographers, clerks, law books, legal periodicals, stationery, telephone and office equipment, and like expenses incurred in the discharge of their duties. Such expenses shall not exceed the sum of two thousand five hundred dollars for any commissioner in any one year.

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